

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 17 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0085-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
MARTHA E. MARQUEZ-CRUZ,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800805

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Joseph P. DiRoberto  
By Joseph P. DiRoberto

Bisbee  
Attorney for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Martha Marquez-Cruz pled guilty to one count of theft by knowingly controlling stolen property, a class three felony, for which the trial court sentenced her to prison for a presumptive, 3.5-year term. In this petition for review, she challenges the same court's summary dismissal of the of-right petition for post-

conviction relief she filed pursuant to Rule 32.1, Ariz. R. Crim. P. We will not disturb a trial court's ruling on a petition for post-conviction relief unless we find it has clearly abused its discretion. *State v. McCall*, 160 Ariz. 119, 129, 770 P.2d 1165, 1175 (1989).

¶2 After embezzling approximately \$155,000 from her employer, Gateway Feathers, Inc., between 2004 and 2008, Marquez-Cruz was indicted on one count of fraudulent scheme and artifice and a second count of theft by controlling stolen property. She accepted a plea offer, and the state agreed to dismiss the first count in return for her pleading guilty to the second count.

¶3 At sentencing, the state urged the trial court to impose a slightly aggravated term of five years in prison. Counsel for Marquez-Cruz argued for a term of probation that included jail time with a work-release provision so Marquez-Cruz could work in order to pay restitution. After hearing from both counsel, the victim, and Marquez-Cruz, the court sentenced Marquez-Cruz to the presumptive term of 3.5 years and ordered her to pay restitution of \$116,920.52.

¶4 In the petition for post-conviction relief that followed, she asserted the trial court had abused its discretion in imposing the presumptive term and in failing to find additional mitigating factors based on certain "psychiatric and psychological evidence" she had presented to the court at sentencing. She claimed the court "did not fully consider or give due consideration to" evidence that she had been suffering from an undiagnosed and untreated bipolar disorder that had significantly impaired her capacity to appreciate the wrongfulness of her conduct. Further, Marquez-Cruz maintained she had been under unusual or substantial duress while she was stealing from her employer. Had the court "properly considered this mitigating evidence," she argued, it would have found her "psychiatric or psychological condition at the time of the offense" to be sufficiently

mitigating that it instead would have sentenced her either to a mitigated or substantially mitigated term.

¶5 Tacitly rejecting this assertion in its written minute entry, the trial court denied relief and dismissed the petition. Noting that it “[wa]s quite familiar with the contents of the file and recall[ed] the proceedings,” the court recited the claims Marquez-Cruz had asserted in her post-conviction petition and declared them lacking in “substantive merit.” This petition for review followed.

¶6 The essence of Marquez-Cruz’s claim, below and on review, is that the trial court did not give sufficient weight to the opinions of psychologist Dr. Philip Balch and psychiatrist Dr. William Sullivan, both of whom had evaluated her before sentencing and whose written reports were before the court. Marquez-Cruz argues on review that the “court ignored Dr. Balch’s and Dr. Sullivan’s reports except to indicate that it disagreed with Dr. Balch [about whether she] posed a low risk to recidivate.” The only apparent basis for her claim that the court had “ignored” the opinions of Balch and Sullivan was that it did not find the evidence of her psychiatric and psychological conditions to be a mitigating circumstance. Thus, she states, “The trial court was silent on this point[,] . . . finding lack of a prior record and remorse as the only mitigating factors in the Defendant’s case.”

¶7 A trial court is not obliged to find the existence of any mitigating circumstance simply because the defendant presents mitigating evidence. It is only required to consider all relevant evidence presented. *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). Moreover, the weight to be accorded any evidence asserted in mitigation rests exclusively in the sentencing court’s discretion. *State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996); *see also State v. Webb*, 164 Ariz.

348, 355, 793 P.2d 105, 112 (App. 1990) (“The consideration of mitigating circumstances is solely within the discretion of the court.”).

¶8 Marquez-Cruz is not contending the mitigating evidence at issue was unavailable to the trial court at sentencing. Clearly the court had received and read the written reports of Balch and Sullivan. And Marquez-Cruz acknowledges the various life circumstances she points to as constituting “unusual and substantial duress” were “presented in [her] sentencing memorandum and argued at sentencing in mitigation of [her] sentence or for a sentence of probation.”

¶9 Although we will presume a sentencing court has considered all information before it, *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), here we need indulge no presumption, because the trial court expressly stated it had done so. As the sentencing hearing began, the court listed the various documents it had received in advance of sentencing, including the presentence report, both the psychological and psychiatric evaluations, a sentencing memorandum filed by defense counsel, and letters written in support of Marquez-Cruz. The court stated it had read the materials submitted and had “considered the possible mitigating and aggravating factors.” And the court was under no obligation “to enumerate the mitigating circumstances or possible mitigating circumstances that it ha[d] considered in [impos]ing . . . the presumptive sentence.” *State v. English*, 129 Ariz. 444, 447, 631 P.2d 1102, 1105 (App. 1981); accord *State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App. 1995); *State v. Cawley*, 133 Ariz. 27, 29, 648 P.2d 142, 144 (App. 1982); *State v. Winans*, 124 Ariz. 502, 504-05, 605 P.2d 904, 906-07 (App. 1979).

¶10 Despite the lack of any evidence controverting the written opinions of Doctors Balch and Sullivan, the trial court was not required to find that either the

stressful circumstances of Marquez-Cruz's life or her mental or emotional illness had so impaired her capacity to appreciate the wrongfulness of her conduct as to constitute a mitigating circumstance. *See Fatty*, 150 Ariz. at 592, 724 P.2d at 1261. Indeed, the court's comments at sentencing suggest those factors very likely were offset in the court's assessment by the significant amount of money Marquez-Cruz had embezzled (almost \$155,000); the number of separate fraudulent acts she had committed (193, by the victim's estimate); and the extended, four-year period over which she had engaged in a sustained pattern of criminal activity.

¶11 We can find no abuse of the trial court's discretion, either in its original imposition of sentence or in its summary dismissal of Marquez-Cruz's petition for review pursuant to Rule 32.6(c). Accordingly, although we grant the petition for review, we deny relief.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge